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Virginia Law Register

VOL. XIII.]

AUGUST, 1907.

[No. 4.]

THE COMMONWEALTH OF VIRGINIA *v.* W. G. LOVING.*

Opinion of Barksdale, J.

In the case at bar the Commonwealth, having proved the homicide and the conduct and declarations of the accused in regard thereto, rested its case. The accused by his evidence sought to justify and excuse his act by proof of the fact that immediately prior to the act his only daughter related to him that she had been drugged and dishonored by the deceased, which assault on his daughter by the deceased occurred, according to her statement, during a buggy drive on the evening before; that he was so overcome by the shock of this intelligence of this gross provocation on the part of the deceased, that he immediately armed himself with a shotgun, went in pursuit of the deceased, and shot him down on sight. Both W. G. Loving, the prisoner, and Elizabeth Loving, his daughter, have testified to the interview between them, and Elizabeth Loving has detailed the incidents of said ride with Theodore Estes, the deceased, testifying that he drugged her and attempted to assault her; that she tried to scream, but that he placed his hand over her mouth; that she became unconscious, and has little or no recollection of subsequent events, until after she was put to bed in Mrs. Kidd's house.

And the prisoner offered expert and other evidence tending to prove that at the time of the homicide that he was not responsible for his acts. The Commonwealth offered to introduce sundry witnesses to discredit Miss Loving's story and to prove that Theodore Estes, the deceased, was guilty of no assault, or other improper conduct towards her, and that the statement made by her to her father was in point of fact untrue.

To the introduction of this testimony the prisoner objected, and the question for the court to decide is as to the right of the Commonwealth to introduce this rebuttal testimony.

For the Commonwealth it is insisted that the tragedy under investigation grew out of the buggy ride, and that all the light possible should be turned on this occurrence, and that the jury are entitled to every fact and circumstance connected with it; that what occurred

*Because of the widespread interest that has been manifested in this case, and as the acquittal of the accused precludes all possibility of an official report, the "Law Register" has had this account of the case prepared, to the end that a full report may be permanently preserved, readily accessible to the profession at all times.

then is a part of the *res gestæ*, and as such should be admitted for the purpose of impeaching Miss Loving.

The prisoner's contention is that the evidence sought to be introduced is not a part of the *res gestæ*, relates to a collateral and immaterial issue, and that its introduction would tend to divert the minds of the jury from the real issue of the case, and that it is not competent for the court to inquire into the truth or falsity of the statements made by Miss Loving to her father.

In *Greenleaf on Evidence*, Vol. I., page 186, section 101, it is said:

"Thus, Lord Abinger says, if a man calls another a liar and was knocked down, the plaintiff in an action for the battery would not be allowed to prove on the trial of the assault that the defendant was really and in point of fact a liar, because evidence of provocation is admitted for the purpose of showing that the feelings of the defendant were excited."

And in the 30th Am. and Eng. Enc., page 1102, it is said that "a test of whether a matter inquired into on cross-examination is collateral to the issues, and therefore not subject to contradiction, which has been often approved by the courts, is this: 'Would the cross-examining party be entitled to prove this as a part of his case, tending to establish his plea?'" Certainly in this case it will hardly be contended that the Commonwealth could prove the incidents of said ride as a part of its case. In the Enc. of Evidence, Vol. VI., page 745, under the head of "Truth or falsity of information or statement," it is said: "The truth or falsity of the matters, information concerning which is the alleged provocation, is not material and cannot be shown, except to corroborate the defendant's own testimony. The State cannot show the truth of an insulting charge or statement by the deceased, but the defendant may prove its falsity, because this fact would increase its provoking effect."

In the case of *Massie v. Commonwealth*, 29th S. W. Rep., page 871, James Hanna, on the day of the killing, informed Massie that Honaker had told him (Hanna) that Massie had improper relations with his cousin. Immediately after hearing that communication Massie seized his gun, got on his horse, and in a state of great rage and excitement went in search of Honaker, riding at a great rate of speed, and killed him.

In that case the court held that "it was competent to prove that Honaker made the charge, and that Hanna communicated the fact to Massie, because, bearing materially upon the question of whether he was guilty, if at all, of murder or manslaughter, but it was wholly immaterial whether the charge was true or false, or whether Hanna assented to the truth of it, and no inquiry as to either fact should have been permitted by the court; for it is easy to perceive how introduction of such irrelevant testimony would prejudice the minds of the jury and induce them to disregard and forget the true issue involved."

And in Cole's Trial, Abbot's Prac. Rep., Vol. VII., the judge, in his charge to the jury, speaking of the adultery of the wife, says:

"The adultery is not proof * * * the confessions of the wife do not prove it. They were not admitted for such a purpose, and are not to have that effect. Their introduction was permitted not as furnishing evidence of the facts themselves, but as communications made to the husband, and which were calculated, more or less, to operate upon his mind and to influence his conduct, and to enable you in the light of subsequent events to judge how far they did so operate, and to determine to what extent the knowledge or information of those facts were calculated to explain and to mitigate or to justify the homicide subsequently committed. As to interpreting the prisoner's subsequent conduct, as throwing light upon the state of his mind, they are admissible and proper to be considered. As furnishing evidence to you in this case of commission of adultery they were not allowed to be introduced, and are not proper to be considered."

In that case Cole was indicted for the murder of Hiscock, and one of the grounds relied upon for his acquittal was because the deceased had seduced Cole's wife, and that in the transport of rage produced in the defendant by such an invasion of the domestic rights or by the subsequent or overwhelming disclosure of the fact to him, he committed the homicide for which he was then on trial. Further in his charge, the judge says:

"It may be that the deceased was not guilty of this offense. He has not had any opportunity to try that question, and his lips are now sealed in death. We are not, therefore, in a condition to say upon which side upon a fair trial the preponderance of the evidence would be."

It is suggested that no case has ever occurred in which this evidence has ever been ignored by a jury. That is not the question. It is not necessary for us to inquire whether former juries have or have not violated their oaths by accepting as evidence facts which have not been proved. It is a dangerous and inadmissible proceeding in a court of justice.

In the argument of the case at bar it was stated by counsel for the defense, and not controverted by the representatives of the Commonwealth, that in perhaps the most famous and noted criminal trial occurring in this country for years—the Thaw trial—proof of the truth or falsity of the communications made by Evelyn Nesbit Thaw to her husband was excluded without serious objection by Mr. Jerome, who represented the prosecution, and a case in California, which could not be furnished to the court, was cited to the same effect.

Against these decisions which, though not binding on this court, are strongly persuasive, representatives for the Commonwealth cite no decided cases as authority for their position, but urge the intro-

duction of the testimony as part of the *res gestæ* and proper to go to the jury to impeach the testimony of Miss Loving.

Should it be admitted to contradict Miss Loving?

In Langhorne's case, 76th Va., 1012, it is said in the syllabus: "No question as to irrelevant facts can be asked witnesses for the purpose of impeaching his credit by contradicting him, but if asked and answered, his answer will be conclusive."

As already said, what occurred on the drive with Estes could not have been proved by the Commonwealth as a part of its case, and according to this test, the facts sought to be disclosed on Miss Loving's cross-examination in this case, in reference to the ride and her return to Lovington, are collateral, and cannot be contradicted. In the same effect is Am. and Eng. Enc. of Evidence, 30th Vol., page 1097, and Nuckols' Admr. *v.* Jones, 8th Gratt., page 274, and in N. and W. Rwy. Co. *v.* Carr, Va. Law Register, June number, 1907, page 122.

William Carr was asked the question on cross-examination: "Did you tell Mary Bray that if she would testify for you today, you would see that she got paid?" After witness had denied that he made the statement further questioning along the same line was objected to, and the objection was sustained. This evidence was collateral to the issue, and calculated to divert the jury from the case before them. In order to avoid an interminable multiplication of issues it is a settled rule of practice that when a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party putting the question. Wharton on Law of Evidence, Vol. I., section 559.

It was earnestly contended, however, that this evidence should be admitted as a part of the *res gestæ*, and as authority for this position, Greenleaf on Evidence, Vol. I., page 53; Ward *v.* White, 86 Va., and Poindexter's case, 33 Gratt., were cited. Judge Lacy in Ward *v.* White, says:

"The area of events covered by the term as *res gestæ* depends upon the circumstances of each particular case * * * and may be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents must stand in immediate causal relation to the act."

In that case the newspaper publications were admitted, because they caused the assault, provoked it, and were of a character to greatly excite and inflame the passions of the defendant.

In the Poindexter case the difficulties, the two transactions, were between the same parties, occurring on the same day, after an interval or only two hours, and the court in that case says:

"Now the first occurrence aforesaid plainly led to and was the cause of the second, and was well understood by Poindexter, and

evidence of the former was clearly admissible evidence on the trial of Poindexter for the homicide of Curtis"; but in this case it cannot be insisted that the buggy ride was the cause of the homicide, or stood in immediate causal relation to it.

Again, it has been urged that the accused did not act as a reasonable man should have acted, and that after hearing his daughter's statement he should have investigated as to its truth.

To hold such a doctrine or to admit the evidence as asked would deprive the prisoner of the benefit of that mercy which the law shows to a man who acts in the heat of blood from a gross provocation. The admission of such evidence would assume that he should have inquired deliberately into the fact when he had received the shock that had probably deprived him of self-control and the power to deliberate.

That would be most unnatural and unreasonable, and would raise the homicide from manslaughter to murder in the first degree by requiring the accused to deliberate when the provocation had deprived him of the ability to do so. And before this evidence can be introduced the Commonwealth should show that the accused knew or had good reason to believe that there was no ground for the provocation when he acted. Neither the character of Miss Loving nor of the unfortunate young man are in issue in this trial, and while the court appreciates and deeply sympathizes with the desire and effort of the relatives of the deceased to clear his name and establish his innocence of any criminal act before the world, it cannot depart from established principles of law and evidence to accomplish this result.

Neither the pressure of sympathy nor the alleged hardship of the case, nor the earnestness and eloquent appeals of counsel for justice and vindication of the deceased should induce the court to take any other course than to decide this question according to the law.

The prisoner may have acted hastily; a terrible and cruel mistake may have been committed, but the law accords to him, as it does to all of its citizens, a fair and impartial trial, and no consideration of sympathy for the deceased and his friends and relatives, or desire to clear his memory, should cause the court to hesitate or pause in the discharge of a duty, however painful and disagreeable.

Being therefore of the opinion that it is not competent to introduce evidence as to the truth or falsity of the communication made by Elizabeth Loving to her father, and that the introduction of the proposed evidence would tend to divert the minds of the jury from the real issue, the motion made by the prisoner to exclude it is sustained.

Once more the glory of our grand old commonwealth has been dimmed by another acquittal under this unwritten law, the growth of which has become alarming. The LAW REGISTER

predicts that it will become the prolific parent of much lawlessness, in that it will lead to private vengeance on the part of those near to the deceased. In short there is danger that Virginia may become a battle ground for feudists.

However much this may be deplored, we are lead irresistibly to the conclusion that this decision by Judge Barksdale is strictly in accordance with the settled rules of evidence, and to the legislature we appeal to make the truth or falsity of these cock-and-bull stories admissible.

We do not believe that any court of justice in this state has, or ever will, recognize this unwritten law as a part of our jurisprudence, but that it will always be appealed to before the jury to work on their passions and sympathy is unquestioned, and is certainly relevant as tending to show the state of mind of the accused at the time of the killing. The sole and only question in this case is: Was the story of such a nature as tended to dethrone the reason and temporarily deprive the accused of the power of distinguishing between right and wrong? What possible relevancy or probative value could the truth or falsity of the story have? In short, was the story of such a nature that the accused must have known that it was false? As to this point the state could have introduced testimony, because it would show there was no ground for the provocation when the accused acted.

The general rule is that collateral facts are inadmissible in evidence, because they do not afford any reasonable presumption or inference as to the principal fact or matter in dispute, and tend to draw away the minds of the jury from the real issue in the case, and to mislead them by a multiplicity of issues. *Mings v. Com.*, 85 Va. 638, citing 1 Greenl. Ev., § 52.

And collateral facts are those which are not directly involved or connected with the principal issue or matter in dispute. *Summerour v. Felker*, 102 Ga. 254.

And the test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea. *Garner v. State*, 25 Southern 364.

Now, as we understand it, the sole issue in this case was as

to the effect such a story would have on the mind of a parent. It was not denied that the story was actually told to him. Did the accused, though mistaken, act on sufficient provocation, without fault or carelessness? and this was a question for the jury to determine. We cannot see what bearing the truth or falsity of the story could have. He believed his daughter; he had a right to presume she was telling him the truth; and it is unlikely that any heart could be so devoid of social duty as to deliberately fabricate such a tale. He knew the deceased had the opportunity to do what his daughter said he did, and the sufficiency of the provocation was solely for the jury, to be determined from the evidence in the case. Did the evidence offered by the commonwealth prove or tend to prove that he acted to his knowledge, without sufficient provocation? Mr. Harmon, in discussing the rule as to homicide, under a mistake of facts, which is that one may act upon the facts as they appear to him "if without fault or carelessness he is misled concerning them," says:

"The evidence offered tended to show that the defendant was mistaken as to the facts as they were reported to him; that he was in a position to ascertain the truth, and it was proper, therefore, for the jury to have the evidence as to the truth or falsity of the facts so that they could determine whether the defendant was prudent, or non-negligent in his action. To submit this question to the jury did not take away from them the question of provocation nor would the admission of the evidence assume that he should have inquired deliberately into the facts when he had received the shock which probably deprived him of self-control. On the contrary it would merely enable the jury—who were the proper triers of the question—to determine whether under all the circumstances of the case, including the provocation, the defendant was prudent, or non-negligent, in acting on the information he had received, without making further investigation through sources that were open and accessible to him. If the jury should be of opinion that he was so much unbalanced by sudden passion as not to be capable of reflection, this fact itself would excuse him from making further investigation. But when the evidence was excluded on the ground

stated, the court took the question away from the jury and undertook to decide questions which belonged to the jury alone."

It is impossible to do more than argue on this point. To our mind the truth or falsity of the story does not tend to show that the accused was mistaken or that he acted negligently or carelessly. The story was probable, and it produced an "irresistible impulse." Evidence to show its improbability would have been admissible, because it would tend to show that no man would be justified in acting on such provocation, and that he was careless and negligent in so doing, but it is beyond us to see how the truth or falsity bore on this; if such were the case, how could this rule of "homicide under mistake of fact" exist; the accused would be compelled to ascertain, or attempt to ascertain the truth, and then his provocation would be no defense as the cooling time would probably have passed. See *Hodges v. Com.*, 89 Va. 265. Thus the defendant may introduce evidence to show that the killing was done while he was under an halluciation or delusion. See *Fain v. Com.* (Ky.), 39 Am. Rep. 213.

Provocation is defined as the act of inciting another to do something (2 Bouv. L. Dict., p. 789), and in the nature of things its truth or falsity would seem to be immaterial, as a man may be incited to do something, acting on a false provocation, as well as on a provocation that is in fact true, and if he acts "without fault or carelessness," and is in truth misled by them, the provocation is sufficient.

In Texas it is provided by statute that insulting words or conduct of the person killed towards a female relation of the accused shall be deemed adequate provocation to reduce the offense to manslaughter, provided of course the homicide was the result of the passion aroused, and was not committed pursuant to a malicious intent to kill. It has been held, repeatedly, that this statute does not require the actual occurrence of an insult, either by words or conduct, but it is sufficient that the accused acted on information given by another, if he believed it, and the killing was done in consequence of passion thereby aroused, though in fact no insult had been given. The homicide must be viewed from the standpoint of the accused. *Jones v. State*, 33 Tex. Crim. 492, 47 Am. St. Rep. 46; *Jones v. State*, 38 Tex.

Crim. 87, 70 Am. St. Rep. 719; *Messer v. State* (Tex. Crim., 1901), 63 S. W. 643.

We cannot see the analogy between this case and those in which the husband takes a man in adultery with his wife; besides, this latter rule is merely one of the rules of the unwritten law, and in the absence of statute, has no rightful place in our jurisprudence.

The probable injustice wrought by excluding this evidence may be great, but this must be addressed to the legislature; it belongs to the courts to administer the law as they find it.